SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 355

TRINITY FARM CONSTRUCTION COMPANY,
APPELLANT,

vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS FOR THE STATE OF LOUISIANA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

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[fol. 2]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

In Equity. Number 271

TRINITYFARM CONSTRUCTION COMPANY, Plaintiff,

vs.

ALICE LEE GROSJEAN, Supervisor of Public Accounts of the State of Louisiana, et al.

BILL OF COMPLAINT—Filed Nov. 2, 1932

To the Honorable the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, in equity:

The plaintiff, Trinityfarm Construction Company, brings this, its bill of complaint, against Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, and her officers, agents and employees, and for cause of action respectfully shows:

1

Plaintiff, Trinityfarm Construction Company, is and was at all times hereinafter mentioned a private corporation, chartered and existing under the laws of the State of Delaware, with its principal office at the City of Wilmington within said State, and a citizen and resident of said State.

2

Defendant, Alice Lee Grosjean, is and was at all times mentioned herein the duly qualified and acting Supervisor of Public Accounts of the State of Louisiana, being the office of said State authorized and required by law to enforce the provisions of certain purported laws of said State known as Act No. 6 of the Legislature of Louisiana for the

year 1928, as amended by Act No. 8 of the Legislature of Louisiana for the year 1930, as amended by Act No. 16 of the Legislature of Louisiana for the year 1932, and to enforce the provisions of Act No. 1 of the Extra Session of the Legislature of Louisiana for the year 1930.

3

The office of defendant is fixed by law at Baton Rouge, [fol. 3] Louisiana, within the Eastern District of the State of Louisiana, where the defendant has her official domicile, which is within the territorial jurisdiction of this Honorable Court.

4

This case is of a civil nature and involves in excess of the sum of Three Thousand Dollars, exclusive of interest and costs, and involves the construction, meaning and effect of the provisions of the laws and statutes of the State of Louisiana, and the acts of said Supervisor of Public Accounts of the State of Louisiana and of her officers, agents, employees, and representatives, each and all of which plaintiff alleges to be in conflict with and repugnant to the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, and in conflict with and repugnant to Paragraph 3 of Section 8 of Article 1 of the Constitution of the United States which confers upon the Congress of the United States exclusive power to regulate commerce with foreign nations and among the several States; and in conflict with and repugnant to Article 1, Section 2 of the Constitution of the State of Louisiana which provides that no person shall be deprived of life, liberty or property except by due process of law, and that private property shall not be taken except for public purposes and after just and adequate compensation is paid. Plaintiff further alleges that this case involves questions arising under the Constitution and laws of the United States and more particularly under Article 1, Section 8, Clause 3 of the Constitution and under the Act of May 15, 1928 (45 Stat. 534), commonly known as the Mississippi Flood Control Act, passed pursuant thereto, all as hereinafter more fully appears. Plaintiff further alleges that this case involves an attempt on the part of

the Supervisor of Public Accounts of the State of Louisiana, under color of the said statutes of the said State of [fol. 4] Louisiana, and on the part of her agents, officers, representatives and employees, to deprive plaintiff of rights secured to plaintiff by the Constitution of the United States of America and the laws enacted pursuant thereto and especially to deprive plaintiff of rights secured to plaintiff by the Articles of the Constitution of the United States and Laws of the Congress of the United States above referred to. Plaintiff further alleges that the acts of the Legislature of the State of Louisiana herein complained of, are repugnant to, in conflict with and violative of Section 16, Article III of the Constitution of Louisiana, which provides that every law shall embrace but one object and shall have a title indicative of such object.

5

Plaintiff is authorized by its charter to make and perform contracts for construction of public works including especially the construction of levees for the United States of America as a part of said Mississippi Flood Control program. Heretofore, to-wit, on July 16, 1931, and on August 5th, 1932, plaintiff entered into two separate contracts with the United States of America for the construction of two levees known as the Cottage-Kempe Levee and the Kempe-Lake St. John Levee, respectively, both in the Parish of Tensas, State of Louisiana, upon which contracts plaintiff is, and at all times since the respective dates thereof, has been continuously engaged.

6

Plaintiff alleges that the construction of each of such levees is required by the contract providing therefor to be completed within a stated number of days; that plaintiff has been required to give and has given performance bonds, binding it and its surety to the completion of the construction of each of such levees within the time provided by the contract therefor and that in default of such completion plaintiff will be required to pay to the United States the sum of Twenty and no/100 ($20.00) Dollars, per day for [fol. 5] each day each or either of such levees may remain uncompleted after the completion dates stipulated therefor.

7

Plaintiff further alleges that the construction of said levees is a function and purpose of the Federal Government, undertaken by it pursuant to the exclusive control of the Congress over commerce between the several States; that such construction is being carried on exclusively upon rights of way furnished the United States therefor and which are exclusively under the jurisdiction and sovereignty of the United States and that the State of Louisiana is wholly without power or jurisdiction in the matter of the construction of such levees and is especially without power to impose any burdens or restrictions upon the use by plaintiff of its equipment necessary in the performance of its said contracts with the United States for the construction of such levees.

8

Plaintiff further alleges that in order to carry out and perform its said contracts with the United States, plaintiff has purchased and agreed to purchase a large amount of equipment necessary for the prompt and efficient performance of said work, including dragline machines, tractors, trucks, graders, wagons and gasoline, a portion of which equipment has heretofore been placed by plaintiff upon said Government rights-of-way and is now and at all times herein mentioned has been used exclusively in actual construction of said levees, and the remainder of which, to-wit, ten carloads of gasoline, it is necessary that plaintiff place upon said rights-of-way and use exclusively in the completion of such work.

9

Plaintiff now alleges that it owns and has under valid contracts to purchase within the states of Arkansas and Texas ten car loads of gasoline, containing approximately [fol. 6] eighty thousand (80,000) gallons, all of which plaintiff has purchased exclusively for use in construction of said levees and all of which is necessary for such purpose.

10

Plaintiff now alleges that the fair and reasonable value of said gasoline is Five Thousand and no/100 ($5,000.00) Dollars.

11

Plaintiff alleges that it is guaranteed the right by the Constitution and statutes of the United States aforesaid to bring into the State of Louisiana all equipment necessary for the performance of said contracts, including, especially, said ten car loads of gasoline, and that it is necessary to the completion of said contracts that it be permitted so to do.

12

Plaintiff now avers, that, despite its rights above set forth, defendant, her agents, officers, representatives and employees, are purporting to act pursuant to the terms of said Act No. 6 of 1928, as amended and pursuant to the terms of said Act No. 1 of the extra session of 1930, of the State of Louisiana, in an effort to exact and compel from plaintiff payment of excise taxes to the State of Louisiana at the aggregate rate of five cents per gallon for the privilege of using each gallon of gasoline so used by plaintiff in the performance of its said contracts with the United States, amounting in the aggregate to Four Thousand and no/100 ($4,000.00) Dollars, exclusive of interest, penalties and costs.

13

That said acts of the State of Louisiana likewise purport to make said gasoline responsible for payment of such attempted excises, together with panalties and costs, and purport to grant to defendant, her agents, representatives, officers and employees, the right to attach said gasoline for non-payment of such tax, penalties and costs.

[fol. 7]

14

That the said acts are violative of and repugnant to the Constitution of the State of Louisiana in that they propose to tax plaintiff as a dealer in gasoline, merely because it makes use of gasoline for the purpose of performing its said contracts with the United States, which purpose or object is not indicated by the titles to said acts.

15

That said acts are violative of and repugnant to the Constitutions of the State of Louisiana and of the United

States for the reason that they purport to levy an excise tax upon the equipment of the plaintiff employed exclusively in work for the United States and used exclusively as a means for the performance by the Federal Government of a function exclusively within its jurisdiction.

16

That, in violation of law and despite the protests of plaintiff, the defendant did, on the 29th day of October, 1932, cause to be seized two cars of gasoline, amounting in all to Sixteen Thousand (16,000) gallons of gasoline, and is now seeking to impose upon plaintiff the said illegal tax together with penalties and costs, with reference to the gasoline thus unlawfully seized.

17

That, in further violation of law, the said defendant threatens to and, unless prevented by proper orders of this Honorable Court, will seize and confiscate the said gasoline and all other gasoline which plaintiff brings into the State of Louisiana upon its introduction into the State of Louisiana, and thereby prevent plaintiff from completing its said contracts with the United States, all to plaintiff's great and irreparable damage in that plaintiff will thereby be prevented from performing its said contracts [fol. 8] with the Government and will thereby lose earnings which it would otherwise have made and incur penalties and losses which it would otherwise escape.

18

Plaintiff says further that all of its said gasoline is for use in performance of its said contracts with the United States, exclusively upon Government rights-of-way, and for no other purpose whatsoever; that no portion of said gasoline is used or intended to be used upon the public roads, highways or bridges of the State of Louisiana, that the excise taxes which defendant, her agents, officers, representatives and employees are seeking to exact of plaintiff, are sought to be collected solely as the price plaintiff is called upon to pay for the privilege of using its own equipment in performance of its said contracts with the United States.

19

Plaintiff now avers that said laws of the State of Louisiana and each and every act of defendant, her officers, agents, representatives and employees, done and threatened to be done pursuant thereto, in an effort to impose said excise upon plaintiff or the privilege of using its said gasoline as part of its equipment in performing its said contracts with the United States, are null, void, unenforceable and contrary to law in that the effect of said laws and of each of such threatened acts pursuant thereto, would be to retard, burden and impede operations of the General Government undertaken pursuant to its Constitution and laws, and to deprive plaintiff of rights conferred thereby.

20

Plaintiff now avers that it is without adequate remedy at law in that it has no means of securing equipment necessary for performance of its said contracts with the United States except through payment of taxes for which it is not legally liable and which it cannot recover at law from the [fol. 9] defendant or the State of Louisiana if the same are paid; that unless restrained by proper orders of this Honorable Court, defendant, her officers, agents, representatives and employees will subject plaintiff to numerous and groundless suits and seizures, which will delay and impede plaintiff in prosecution of the said contracts with the United States and cause plaintiff a large financial loss and expense, no portion of which could plaintiff recover at law from defendant, her officers, agents or representatives or from the State of Louisiana.

21

Plaintiff further avers that under the Constitution and laws of the United States and under the Constitution and laws of the State of Louisiana and under the Rules and practice of this Court, it is entitled to a temporary restraining Order and to an interlocutory injunction for the reason that unless the said restraining order and said interlocutory injunction shall issue herein its said gasoline will be obliged to pay the said illegal excise taxes or to suffer its property to be seized to its irreparable injury as aforesaid.

Wherefore, as plaintiff is without adequate remedy at law for protection in this matter, plaintiff respectfully prays:

That proper process issue and be served upon the defendant, Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, making her a party defendant to this suit and requiring her to appear and answer this bill within the time allowed by law but not under oath, answer under oath being expressly waived.

That an order to show cause issue herein directed to the said defendant and requiring her to appear and show cause why a preliminary injunction should not issue, as herein prayed for, enjoining and restraining the defendant, her successors in office, her officers, agents, representatives and employees, and any and all persons or parties acting under [fol. 10] their suggestions, directions, control or authority, from endeavoring or attempting to collect or require the payment of the said illegal tax, or any part thereof, or from interfering in any way directly or indirectly with plaintiff in the use of its said equipment, and, more particularly, in the use of its said gasoline; and from prosecuting or causing to be prosecuted any suit or suits against the plaintiff or its agents, servants or employees, to collect any taxes, fines or penalties or impose any prison sentences because of the failure or refusal to pay said tax, fines, penalties or costs in connection therewith.

That upon final hearing of this cause the said preliminary injunction may be made permanent and defendant, her successors in office, attorneys, agents, officers, representatives or any one whomsoever acting under their orders, authority, director or control be permanently enjoined from interfering with the plaintiff in the use of its equipment, and more particularly, its said gasoline, or from imposing or attempting to impose any excise taxes or penalties upon plaintiff or its agents, servants, or employees because of the failure or refusal to pay such tax, and from prosecuting or causing to be prosecuted any suit or suits against the plaintiff its officers, agents or employees, to collect any fines or penalties because of the failure or refusal to pay said tax.

That, in as much as immediate and irreparable loss or damage will result to plaintiff unless a restraining order be granted before this matter can be heard on notice before three Judges in accordance with the requirements of the

Statutes in such cases made and provided, a temporary restraining order without notice be made and do issue to the defendant, Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, restraining her and her officers, agents, representatives and employees and all persons whomsoever acting for or under them or by their authority, to the extent and in the manner hereinabove prayed for.

[fol. 11] That notice of this application be served upon the Governor of the State of Louisiana, and upon the Attorney General of the State of Louisiana, giving said Governor and said Attorney General at least five days' notice of the hearing to be had.

And plaintiff prays for such other and further relief as may be equitable or proper in the premises.

(Sgd.) D. K. Woodward, Jr., Breazeale & Sachse,
Attorneys.

[fol. 12] *Duly sworn to by H. Payne Breazeale. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed Nov. 2, 1932

On motion of the Plaintiff herein, Trinityfarm Construction Company, through its attorneys, D. K. Woodward, Jr., and Breazeale and Sachse:

And, upon consideration of the Bill of Complaint filed herein and it appearing from the said Bill of Complaint and the affidavit annexed thereto that immediate and irreparable injury would enure to Plaintiff unless a temporary restraining order do issue herein pending the hearing upon the application for a preliminary injunction,

It is ordered and decreed that a temporary restraining order do issue herein restraining and enjoining the defendant, Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, her officers, agents, representatives and employees and any and all persons or parties acting under their suggestion, direction, control or authority, from endeavoring or attempting to collect or require the payment

[fol. 14] of the said tax, of any part thereof, or from interfering in any way, directly or indirectly, with the plaintiff, its agents and employees, in the use of its equipment, and, more particularly, with the use of its gasoline; and from prosecuting or causing to be prosecuted any suit or suits against the plaintiff or its agents or employees, to collect any taxes, fines or penalties or to impose any prison sentences because of the failure or refusal to pay said tax, fines, penalties or costs in connection therewith; and that this restraining order be and remain in effect to the 12th day of November, 1932, or to any further time to which the same may be extended.

It is further ordered and decreed that the plaintiff file bond in the sum of Six Thousand & no/100 ($6,000.00) Dollars, to be approved by the Judge of this Court, or in the absence of the Judge, by the Clerk of this Court, conditioned upon the prompt and full payment of any loss or damage the said defendant may sustain by reason of this temporary restraining order being issued without notice.

It is further ordered and decreed that immediate notice of not less than five days of said hearing be given to Oscar K. Allen, Governor of the State of Louisiana, Gaston L. Porterie, Attorney General of the State of Louisiana, and also to the defendant, Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana.

(Sgd.) Wayne G. Borah, Judge.

New Orleans, Louisiana, November 2nd, 1932, 4:45 p. m.

[fol. 15] Bond on restraining order for $6,000, approved and filed Nov. 2, 1932, omitted in printing.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT—Filed Nov. 28, 1932

Now into this Honorable Court, through undersigned counsel, come defendants in the above numbered and entitled cause, and for answer to plaintiff's bill of complaint aver as follows:

I

Respondents admit the allegations of paragraph one of plaintiff's bill of complaint.

II

Respondents admit that the Supervisor of Public Accounts of the State of Louisiana is charged with the duty of enforcing the provisions of Act 6 of the Extra Session of the Legislature of Louisiana of 1928, as amended by Act 8 of the Legislature of Louisiana of 1930, and by Act 16 of the Legislature of Louisiana of 1932, and to enforce the provisions of Act 1 of the Extra Session of the Legislature of Louisiana of 1930, the latter being an amendment to the Constitution of the State of Louisiana, duly submitted to and ratified by the qualified electors of said State at an election held November 4, 1930.

III

Respondents admit the allegations of paragraph three of plaintiff's bill of complaint.

IV

Respondents admit that this case is of a civil nature and involves a sum in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and that it involves the construction, meaning and effect of the provisions of Act 6 of the Extra Session of the Legislature of Louisiana of 1928, as amended by Act 8 of the Legislature of Louisiana of 1930 and Act 16 of the Legislature of Louisiana of 1932, and also involves the construction, meaning and effect of the provisions of an unnumbered Article of the Consti- [fol. 17] tution of the State of Louisiana, submitted under the provisions of Act 1 of the Extra Session of the Legislature of Louisiana of 1930, and duly ratified by the qualified electors of the State of Louisiana at an election held November 4, 1930.

Respondents deny that the aforesaid Act 6 of 1928, as amended, and the aforesaid unnumbered Article of the Constitution of the State of Louisiana, are in any manner in conflict with or repugnant to the 14th Amendment to the Constitution of the United States; or that they are in any manner in conflict with or repugnant to Article 1, Section 8,

Clause 3 of the Constitution of the United States; and that they are in any manner in conflict with or repugnant to Article I, Section 2, of the Constitution of the State of Louisiana.

Respondents specially deny that this case involves questions arising under the Act of Congress of May 15th, 1928, commonly known as the Mississippi Flood Control Act, except in a most immaterial and incidental manner.

Respondents specially deny that this case involves any attempt on the part of the Supervisor of Public Accounts of the State of Louisiana to deprive plaintiff corporation of any rights secured to it by the Constitution of the United States or the laws thereof, or of any rights guaranteed to it by the Constitution and laws of the State of Louisiana.

Respondents specifically deny that the Acts of the Legislature of the State of Louisiana referred to are in any manner in conflict with or violative of Section 16, Article III of the Constitution of Louisiana.

V

Respondents admit the allegations of paragraph five of plaintiff's bill of complaint.

VI

Respondents admit the allegations of paragraph six of plaintiff's bill of complaint.

VII

Respondents admit that the Federal Government has undertaken to construct the levees which plaintiff company [fol. 18] has contracted to build under its aforesaid contracts referred to in paragraph five of its bill of complaint.

Respondents further admit that such levee construction work is being carried on exclusively upon rights of way furnished to the United States therefor by the State of Louisiana and the Tensas Levee District of Louisiana.

Respondents specifically deny that the aforesaid rights of way are exclusively under the jurisdiction and sovereignty of the United States, and specifically deny that the State of Louisana is wholly without power or jurisdiction

in the matter of the construction of said levees, or without power or jurisdiction over the rights of way upon which the same are being constructed.

Respondents particularly deny that the State of Louisiana has imposed, or intends to impose, any burden or restriction upon the use by plaintiff of such equipment as is necessary for it to employ in the performance of its said contracts with the United States Government for the construction of the levees aforesaid; but respondents admit and aver that it is the purpose of the State of Louisiana, through its aforesaid Supervisor of Public Accounts, to collect the excise taxes due to the State of Louisiana, which are imposed under the provisions of the aforesaid Act 6 of 1928, as amended, and the aforesaid Act 1 of the Extra Session of the Legislature of Louisiana of 1930, the latter being in fact an amendment to the Constitution of the State of Louisiana, duly adopted and ratified by the qualified electors of the said State at an election held on November 4, 1930, which aforesaid excise taxes are due to the State of Louisiana by complainant company by reason of the importation into the State of Louisiana from without the boundaries thereof, of gasoline by complainant company as a dealer therein, which gasoline complainant company has imported, stored, held, distributed, and handled for its own use and consumption within the State of Louisiana, and which aforesaid importation into, storage, distribution and use within the State of Louisiana classifies complainant company as a dealer, as aforesaid, within the intendment of the aforesaid Act 6 of 1928, as amended, and the [fol. 19] aforesaid unnumbered Article of the Constitution of the State of Louisiana, and on all of which said gasoline thus imported from other states and used by it, the aforesaid complainant company, as dealer, is required to pay the taxes on the gasoline so imported and used the same as if it had been sold for domestic consumption, all as provided by the aforesaid Act 6 of 1928, as amended, and the aforesaid unnumbered Article of the Constitution of the State of Louisiana.

Respondents specifically deny that the gasoline so imported into Louisiana and used and consumed by complainant company within said State, is in any sense a part of the equipment of complainant company.

VIII

Respondents specifically deny that any part of the equipment of complainant company used in the carrying out of its aforesaid contracts with the United States Government for the construction of the levees aforesaid, such as draglines, machines, tractors, trucks, graders and wagons constitute equipment specially purchased or acquired by complainant company for exclusive use in carrying out the aforesaid work it has contracted with the United States Government to perform, but that the same constitutes the regular and ordinary equipment suitable for employment in any work of a similar character whether of a public or private nature.

Respondents specifically deny that such gasoline as complainant company has imported into and used and consumed within the State of Louisiana on the work aforesaid, was in any sense a part of the equipment of complainant company, or may reasonably or legally be considered as such.

Respondents specifically deny that complainant company is under contractual obligation with the United States Government to import into the State of Louisiana and to use in said State gasoline in any quantity, but aver that importation of such commodity has been undertaken by complainant company voluntarily and of its own accord, and that if any license tax is imposed by the laws of Louisiana upon dealers who import gasoline into said State for use, sale or consumption of such commodity in Louisiana, that com- [fol. 20] plainant company, so respondents are informed and believe, has obligated itself, by the terms of its aforesaid contracts with the United States Government, to pay such license or excise tax without additional expense to said Government.

Respondents specifically deny that the rights of way for the levees which are being constructed by complainant company are rights of way belonging to the United States Government, or that the United States Government has any proprietary interest in said rights of way.

IX

Respondents admit that complainant company has imported and expects to import from other states into the State of Louisiana for distribution and use therein, ten car

loads of gasoline containing approximately 80,000 gallons; and that plaintiff has stored, and expects to store, hold, distribute, handle, use, and consume all of said gasoline within the State of Louisiana.

X

Respondents admit the allegations of paragraph ten of plaintiff's bill of complaint.

XI

Respondents admit the allegations of paragraph eleven, except that respondents specifically deny that the gasoline imported by complainant company into Louisiana, or which it expects to import into Louisiana, for use within said State, is in any sense a part of the equipment of the complainant company, or that complainant company is in any sense obligated under its aforesaid contract to import said gasoline into the State of Louisiana, or that it is essential to the completion of plaintiff company's aforesaid contracts that it be permitted to do so, particularly without payment to the State of Louisiana of the taxes legitimately due to said State under the provisions of the aforesaid Act 6 of 1928, as amended, and the aforesaid provisions of the Constitution of Louisiana.

XII

Respondents admit that it is the purpose of the Supervisor of Public Accounts of the State of Louisiana to en- [fol. 21] force as against complainant company, as an importer of gasoline into Louisiana for distribution and use therein and hence a dealer in gasoline as defined by the aforesaid Act 6 of 1928, as amended, and by Act 1 of the Extra Session of 1930, the letter being an amendment to the Constitution of the State of Louisiana, and to that end to collect from plaintiff company as a dealer in gasoline the excise taxes legitimately due to the State of Louisiana by it as aforesaid, which said excise taxes would approximate $4,000.00 on the amount of gasoline which complainant company alleges it has imported and expects to import into Louisiana.

XIII

Respondents admit the allegations of paragraph thirteen of plaintiff's bill of complaint.

XIV

Respondents deny the allegations of paragraph fourteen of plaintiff's bill of complaint.

XV

Respondents deny that the aforesaid Acts of the Legislature of Louisiana or the aforesaid unnumbered Article of the Constitution of said State are in any manner violative of or repugnant to the Constitutions of the United States and of the State of Louisiana; respondents specifically deny that the aforesaid statutes or constitutional provisions of the State of Louisiana purport to levy an excise tax upon the equipment of the plaintiff company employed by it in its work for the United States Government, but that the taxes are imposed and are sought to be collected on gasoline imported into the State of Louisiana from without the boundaries thereof, by complainant corporation as dealer, for distribution, sale, or use in the State of Louisiana, and by reason of which importation, under the provisions of the statutes and constitutional provisions aforesaid, plaintiff company is a dealer in gasoline and as such dealer is required to pay the excise taxes imposed upon such dealer on the amount of gasoline so imported into and used in Louisiana by it, the same as if said gasoline had been sold for domestic consumption.

Specially and further answering this paragraph, re- [fol. 22] spondents aver and show that if complainant company, by the language employed by it in paragraph fifteen of its bill of complaint herein, means to plead exemption from payment of said excise taxes on the ground that it is an agency or instrumentality of the United States Government, then respondents deny that plaintiff company is such an agency or instrumentality, and aver, on the contrary, that it is an independent contractor; and, further, that if such exemption is intended to be pleaded, plaintiff company is without cause or right to urge the same since such exemption, if properly pleadable is personal to the United States of America and may only be claimed by it by direct appearance or intervention in this proceeding.

Further specially answering, respondents aver and show that plaintiff company does not allege, aver or contend in paragraph fifteen of its aforesaid bill of complaint, or in

any other paragraph thereof, that the Government of the United States, in so far as the execution of the present contracts with complainant company is concerned, will suffer any financial loss or burden by the imposition upon and collection from complainant company of the excise taxes aforesaid, or that said Government will in any manner effect a saving in the cost of the work contracted to be done by complainant company under its aforesaid contracts with the United States Government in the event complainant company is absolved from payment of the aforesaid excise taxes by this Honorable Court.

XVI

Respondents admit the seizure of gasoline referred to in paragraph sixteen of plaintiff's bill of complaint, but deny that said seizure was in any manner unauthorized and illegal, and that the taxes sought to be collected, together with penalty and costs, are likewise in any manner unauthorized and illegal.

XVII

Respondents admit that it is the purpose of the Supervisor of Public Accounts of Louisiana, in the performance of the duty imposed upon her by law, to resort to all means and measures provided by the Act 6 of 1928, as amended, [fol. 23] and the Constitutional provisions hereinabove referred to, in order to collect the aforesaid excise taxes legitimately due to the State of Louisiana by complainant company.

Respondents specifically deny that the enforcement of the aforesaid statutes or constitutional provisions of Louisiana work great and irreparable damage to complainant company or that complainant company will in any manner thereby be prevented from performing its aforesaid contracts with the United States Government, and that it will be subjected to loss, penalties or costs, unless it fails to comply with the provisions of the aforesaid statutes and constitutional provisions of Louisiana.

XVIII

Respondents admit the allegations of paragraph eighteen of plaintiff's bill of complaint, except to deny that the

United States Government has any proprietary interest in the rights of way upon which plaintiff is presently constructing levees under its aforesaid contracts with said Government; and to further specially deny that the excise taxes sought to be collected from complainant company upon gasoline imported by it into Louisiana as a dealer for use therein, "are sought to be collected solely as the price plaintiff is called upon to pay for the privilege of using its own equipment in performance of its said contracts with the United States."

Respondents aver, on the contrary, that the excise taxes aforesaid are not imposed upon plaintiff company for the privilege of using its equipment in Louisiana, but are imposed upon and sought to be collected from complainant company for the privilege of engaging as a dealer in the distribution, use or sale of gasoline in Louisiana, since it admittedly has imported said gasoline into said State from other States for distribution, sale and use in Louisiana, and has thereby become such a "dealer" within the intendment of and as particularly defined by the aforesaid Act 6 of 1928, as amended, and the aforesaid Constitutional provisions of Louisiana, and from which "dealer" the excise taxes aforesaid, under the statutes and Constitutional provisions aforesaid, are properly collectible.

XIX

Respondents deny the allegations of paragraph nineteen [fol. 24] of plaintiff's bill of complaint for the reasons set forth in paragraph eighteen of this answer, and respondents now particularly aver and show that the aforesaid excise taxes accrue, are due and become collectible immediately upon the gasoline coming to rest in the State of Louisiana by reason of the removal and unloading of the same from the railroad tank cars, in which it is brought into the State, into the storage tanks of complainant company in Louisiana. That if the aforesaid gasoline becomes a part of plaintiff company's equipment at all, which is denied, it can only become a part of such equipment after its withdrawal and distribution from the storage tanks aforesaid, since its status and established situs while in said storage tanks cannot be changed except by such withdrawals and distribution, irrespective of the nature of its subsequent utilization by complainant company.

Respondents specially aver and show that the ultimate use to which the aforesaid gasoline is put in the State of Louisiana, subsequent to its withdrawal and distribution from the storage tanks of complainant company, and after it has attained a situs in said State as aforesaid, is not only not an issue in this cause, but respondents specially deny that such ultimate use is the criterion by which the right of the State of Louisiana to tax the same is to be guaged, your respondents on the contrary averring and showing that the status of said gasoline at the time it is withdrawn and distributed from complainant company's aforesaid storage tanks, regardless of the nature and character of use to which it may subsequently be put in Louisiana, is alone to be considered in determining the right of said State to tax the same.

XX

Respondents deny the allegations of paragraph twenty of plaintiff's bill of complaint.

XXI

Respondents deny complainant company's alleged right to either a preliminary or permanent injunction herein; and particularly deny that the aforesaid excise taxes sought to be collected by the State of Louisiana are illegal or un-
[fol. 25] constitutional, or that plaintiff company will suffer irreparable injury by reason of the payment of said excise taxes.

XXII

And now further and specially answering, respondents aver and show that it is informed and believes, and so believing avers, that complainant company has included in the price bid by it for the construction work covered by its aforesaid contracts with the United States Government the price of all gasoline intended to be used by it in the execution of its aforesaid contracts, plus the amount of the excise taxes it may be required to pay as a dealer in such gasoline, based upon the number of gallons of gasoline distributed from complainant company's aforesaid storage tanks and to be used by it on the work aforesaid, and that complainant company does not offer to return the amount of said excise taxes to the United States Government, or obligate or commit itself to a diminution of said contract

price with said Government in an amount proportionate and equal to the amount of said excise taxes, in the event plaintiff company is absolved from payment of said taxes by this Honorable Court.

XXIII

Further and specially answering respondents show that they are informed and believe, and believing aver, that complainant company, by the specific terms of its aforesaid contracts with the United States Government is obligated, without additional expense to said Government, to obtain all required licenses and permits in connection with the prosecution of the work contracted to be done by complainant company, and respondents specially aver and show that the excise taxes sought to be collected by the State of Louisiana from complainant company are mere license taxes imposed by the State of Louisiana upon complainant company for the privilege of conducting the business of dealer in gasoline within said State, and is of the very character of "Licenses" which complainant company has obligated itself under its aforesaid contracts with the United States Government to obtain without additional expense to said Government.

Further specially answering, respondents aver and show that complainant company's present action is merely an [fol. 26] effort whereby it seeks to enrich itself and enhance its profits under its aforesaid contracts with the United States Government both at the expense of the State of Louisiana and at the expense of the United States Government by claiming exemption from payment of the excise taxes aforesaid on the ground that said taxes constitute a burden upon the means whereby complainant company is endeavoring to fulfill its aforesaid contracts with said Government, which aforesaid conduct constitutes a sham, fraud and subterfuge resorted to in an effort to disguise the fact that it has by contractual obligation bound itself to pay such excises or licenses without additional expense to the United States Government, and thus to retain for its own profit, use and benefit the amount of said excise taxes which it has already included in the price of its bids for the aforesaid work contracted to be done by it for the United States Government, and which amount it has not and does not obligate itself to restore to the United States Government in

the event complainant company is absolved from the payment of the aforesaid excise taxes, all to the unjust, unjustifiable and inequitable impairment and diminution of the tax revenues of the State of Louisiana, and without profit, benefit or advantage to the United States Government.

XXIV

Further and specially answering, respondents aver that complainant company's failure in its bill of complaint herein to obligate or pledge itself to restore and return to the United States Government the amount of the aforesaid excise taxes already added to and included in its bids and contract price for the construction work aforesaid, or to diminish and deduct from its aforesaid contract price a sum equal to the amount of the aforesaid excise taxes in the event complainant company is absolved by this Honorable Court from paying the same, is in effect and in fact to invoke the aid of this Honorable Court in the perpetration of a fraud against the United States Government and the State of Louisiana and constitutes a violation of the restrictive maxim of equity which enjoins that "He who comes into Equity must come with clean hands," and which aforesaid omission, failure and neglect to do equity, and which aforesaid unrighteous and unconscionable acts and [fol. 27] conduct, which if upheld would amount to a fraud upon both the United States Government and the State of Louisiana, directly affect the equitable relations between defendants and complainant and arise out of the transactions which form the subject of plaintiff's suit, and to which unconscionable and iniquitous acts and conduct a Court of Equity cannot lend its aid.

XXV

And now further and specially answering, but in the alternative only, respondents aver that the aforesaid Act 6 of 1928, nor its aforesaid amendments, nor Act 1 of the Extra Session of Louisiana of 1930, have ever been at any time declared illegal or unconstitutional by any court of competent jurisdiction; that the legality and constitutionality of all statutes are presumed until the contrary has been judicially determined; that everyone is presumed to know the law and may not plead ignorance thereof, for all

of which reasons complainant company is presumed to have had notice and knowledge that importers of gasoline into the State of Louisiana as dealers, for distribution, sale, use or consumption therein, were required to pay an excise or license tax for the privilege of engaging in such business, said excise tax or license tax aggregating five cents per gallon on all gasoline or motor fuel sold, used or consumed in the State of Louisiana for domestic consumption. That if complainant corporation failed to compute the aforesaid license or excise taxes in its aforesaid bids as forming a part of the basic cost of the work contracted to be done by it for the United States Government, it failed to exercise a right which prudent and intelligent bidders are presumed to exercise, and hence displayed a lack of vigilence the consequences of which it alone must bear. That having slumbered on its rights it now seeks to retrieve its error at the expense of the State of Louisiana, which, if permitted to do, would be tantamount to penalizing said State for complainant company's lack of vigilance, and for its having slumbered on its rights, and to enable it to profit by its aforesaid laches at the expense of the State of Louisiana, all of which likewise directly affects the equisable relations between defendant and complainant, and to which unconscionable and iniquitous act and conduct a Court of equity cannot lend its aid.

[fol. 28] Wherefore respondents pray that complainant company's petition be dismissed for want of equity; that its prayer for any form of equitable or other relief be denied; and respondents further pray for all other orders and decrees necessary in the premises, for costs, and for all general and equitable relief.

(Sgd.) Gaston L. Porterie, Attorney General. S. (Sgd.) Peyton R. Sandoz, Special Ass't Attorney General. (Sgd.) Justin C. Daspit, Special Ass't Attorney General.

Duly sworn to by Alice Lee Grosjean. Jurat omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT OF FACTS—Filed Nov. 28, 1932

Statement of facts and admissions agreed upon by complainant and defendants in the above numbered and entitled cause, at New Orleans, Louisiana, on this 28th day of the month of November, A. D. 1932, the same to be submitted to the court in lieu of specific and individual proof of each admitted fact, and to serve as a comprehensive outline of the issues of fact and of law involved in the above numbered and entitled cause, and upon which, it is agreed, judgment of the court, either interlocutory or definitive, may be predicated

It is admitted:

1. That complainant is a private corporation organized under the laws of the State of Delaware, with its principal office at No. 7 West Tenth Street, in the City of Wilmington, County of New Castle, in said State.

2. That included in the independent nature of the business for which it was organized, and the objects and purposes to be transacted, promoted or carried on by it, are: "To contract for the erection, construction or repair of any building, structure or improvement, Public or private, and erect, construct or repair same or any part thereof, and to acquire, own and prepare for use any materials for said purpose."

3. That public levee construction work is one of the the objects for which complainant company was organized, and that such work, under the laws of Louisiana, is denominated a work of "public improvement."

4. That complainant company's charter authority to undertake works of public improvement is not exclusive, but by virtue of the independent nature of its business any work which it may be authorized by its charter to undertake may be executed as well for private individuals, and corporations.

5. That complainant company is under contract with the United States Government to construct what is known as

the Kempe-Lake St. John Levee, and the Cottage-Kempe Levee, both in the lower Tensas Levee District, State of Louisiana, on the main stem of the Mississippi River.

6. That the rights of way for the levee foundations and the levees which complainant company has obligated itself to construct under the contracts referred to in paragraph 5 hereof, have been provided by the State of Louisiana, [fol. 30] or the Tensas Levee District, to the United States Government without cost to the latter.

7. That the United States Government has no proprietary interest in the aforesaid rights of way, nor in the levees either before or after their completion, but has exclusive jurisdiction over the design, location, and construction thereof as relates solely to results, and is solely responsible for the cost of such construction.

8. That complainant's suit is a civil action and involves a sum in excess of $3000, exclusive of interest and costs.

9. That this section involves the construction, meaning and effect of the provisions of Act 6 of the Legislature of Louisiana of 1928, as amended by Act 8 of 1930 and Act 16 of 1932, and Act 1 of the Extra Session of the Legislature of Louisiana of 1930, the latter being in fact an amendment to the Constitution of the State of Louisiana duly ratified by the qualified electors of said State at an election held November 4, 1930.

10. That the aforesaid statutes are alleged to be in conflict with the "due process" clause of the 14th Amendment to the Constitution of the United States; and repugnant to the "interstate commerce" clause of said Constitution, being Art. 1, Sec. 8, Cl. 3, thereof.

11. That the aforesaid statutes are alleged to be in conflict with Art. 1, Section 2 of the Constitution of Louisiana, being the "due process" clause of the said Constitution, and with Article III, Sec. 16 of said Constitution providing that every law shall embrace but one object, and shall have a title indicative of such object.

12. That the contracts entered into by complainant company with the United States Government, and referred to in paragraph 5 hereof, were entered into under authority of Acts of Congress of May 15, 1928, February 23, 1931, and

July 14, 1932, and are the Standard Government Form of Contract for such construction work.

13. That all shipments of gasoline which complainant company has used and will use in the performance of said contracts have been and will be made from points outside the State of Louisiana to points within said State.

14. That the equipment used by complainant company in performing the work under its aforesaid contracts, such as dragline machines, tractors, tanks, graders and wagons, constitutes the private property of complainant company, acquired with its own funds prior to the date of the aforesaid contracts, with the exception of possible minor replacements, and is the same, or similar equipment as is used by it in performing similar work either public or private.

15. That the gasoline which complainant company has imported and will import into Louisiana was and will be imported by complainant for its use in the State of Louisiana exclusively in performance of its work under the contracts referred to in paragraph 5 hereof.

[fol. 31] 16. That gasoline as defined by the Acts of the State of Louisiana, aforesaid, is essential to the operation of draglines, tractors, trucks, graders and other equipment used by complainant company in performance of its said contracts with the United States Government, but that the selection by complainant corporation of the type of machinery requiring the use of gasoline to operate is not a requirement of the United States Government under the contracts aforesaid.

17. That such gasoline as it expects to import into Louisiana during the life of the aforesaid contracts, is to be stored in Louisiana by complainant and withdrawn from storage by it as necessity requires for exclusive use on the work which complainant has contracted to perform under the contracts referred to in paragraph 5 hereof.

18. That such gasoline as complainant company has already imported, or which it may hereafter import into Louisiana during the life of the aforesaid contracts, has and will be stored and used in Louisiana by complainant company exclusively for domestic consumption in performance of

its aforesaid contracts, such withdrawals from storage and use being made as necessity and occasion require, and that none of said gasoline has been or is now, or will be, used on or over the public highways and bridges of the State of Louisiana.

19. That complainant company, in connection with its bid on each of such contracts, was required to and did submit to proper representatives of the United States Government a list of machinery which it proposed to use on such contracts, respectively, if same should be awarded to it, which machinery consisted of draglines, tractors, trucks, et cetera.

20. That the contracts referred to in paragraph 5 hereof were obtained by complainant from the United States by competitive bidding, on the basis of award to the lowest responsible bidder.

21. That complainant company's contract for the construction of what is known as the Kempe-Lake St. John Levee involves the placing of approximately 9,000,000 cubic yards of earthwork, for which complainant's low bid of 14.81 cents per cubic yard, place measurement, was accepted, the total price approximating $133,290.00.

22. That complainant company's contract for the construction of what is known as the Cottage-Kempe Levee, involves the placing of approximately 4,280,000 cubic yards of earth-work, for which complainant's low bid of 16.45 cents per cubic yard, place measurement, was accepted, the total price approximating $704,060.00.

23. That in the execution of said contracts complainant company is obligated to furnish all labor and materials, and perform all work required to construct the aforesaid levees, and obligates itself to perform said work in strict accordance with specifications, schedules and drawings prepared by the Department of Engineers, U. S. Army, all of which are made a part of said contract.

[fol. 32] 24. That all labor or assistants so furnished and employed by complainant company on the aforesaid work are under the control of complainant company, except that reservation is made of the right of the contracting officer of the United States to require the complaint company to dis-

miss from the work such employee as the aforesaid contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

25. That complainant company shall give personal supervision to the work, or have a competent foreman or superintendent, satisfactory to the contracting officer of the United States, on the work at all times during progress, with authority to act for complainant.

26. That complainant company, under the terms of its aforesaid contracts with the United States, is obligated, without additional expense to the Government, to obtain all required licenses or permits, and be responsible for all damages to persons or property that occur as a result of complainant company's fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed, paid for by the Government on partial estimates, until completion and final acceptance of the work.

27. That complainant company has not obligated itself, nor is it obligated under the terms of the contracts referred to in paragraph 5 hereof, to reimburse or return to the United States Government any tax, or portion thereof, which complainant company may be relieved from paying to the State of Louisiana as a result of this suit.

28. That the gasoline used and expected to be used by complainant company in Louisiana is and will be imported by it wholly from the States of Arkansas and Texas in railroad tank cars; that such gasoline is and will be unloaded from such tank cars by complainant company into storage tanks of said company situated on the rights of way of the levees which complainant has contracted with the United States Government to construct, and into storage tanks of complainant company situated at Newellton, Louisiana, and from thence transported to other storage tanks of said company, located on said rights of way, and that said gasoline is and will be thereafter withdrawn from said storage tanks and used exclusively upon the public work aforesaid as need and occasion therefor arises, and

that no tax on said gasoline has been paid to the State of Louisiana by complainant company.

29. That complainant company will require between the date of filing its bill of complaint herein on November 2, 1932, and the completion of said contracts ten car-loads of gasoline containing approximately 8000 gallons each which it has purchased and agreed to purchase for shipment to it as needed from points outside the State of Louisiana.

[fol. 33] 30. That on and prior to October 29, 1932, complainant company had purchased in the State of Arkansas and had shipped to it at Newellton, in the Parish of Tensas, State of Louisiana, a certain car-load of gasoline consisting of 8,162 gallons contained in Car No. GATX-2795, and had purchased in the State of Texas and has shipped to it at Newellton, in the Parish of Tensas, State of Louisiana, 8,087 gallons of gasoline contained in Car No. NATX-15162; that all of said gasoline in both of said cars was purchased for use in performance of two contracts; that on said date, October 29, 1932, the State of Louisiana, acting through respondent, Alice Lee Grosjean, in her official capacity as Supervisor of Public Accounts, instituted suit against complainant company for taxes, penalties and costs alleged to be due under the statutes aforesaid and caused said two car-loads of gasoline to be seized under attachment to secure payment of the sum claimed; that complainant company was compelled to and did enter into bond as provided by law to secure release of said gasoline so held in attachment; that unless restrained in this proceeding respondent, Alice Lee Grosjean, in her official capacity proposes to continue her efforts to collect said tax.

It is agreed that the foregoing statement correctly presents to the Court all admitted questions of fact and all controverted issues of law relating to the transactions forming the subject matter of this litigation, and that both complainant and defendant reserve the right, should either deem proper, to submit supplemental proof on matters not covered by the foregoing statement and not inconsistent therewith, subject to the right of either party to interpose all legal objections thereto.

In testimony of all of which undersigned counsel for both complainant and defendants have hereunto signed, at the

City of New Orleans, Orleans Parish, Louisiana, on this Twenty-eight (28th) day of the month of November, A. D., 1932, after due reading of the whole.

(Sgd.) D. K. Woodward, Jr., Breazeale & Sachse, for Complainants. (Sgd.) Gaston L. Parterie, Attorney General (D.); (Sgd.) Justin C. Daspit, Special Ass't Attorney General; (Sgd.) Peyton R. Sandoz, Special Ass't Attorney General, for Defendants.

[fol. 34] EXHIBIT "D-3", BEING STANDARD GOVERNMENT FORM OF CONTRACT—Filed November 28th, 1932

Standard Form No. 23.
Approved by the President Nov. 19, 1926.
Contract dated Aug. 5, 1932.
W 1096, eng. 2178.

Standard Government Form of Contract

(Construction)

War (Engineer Department at Large), U. S. Engineer Office, (Department) Second New Orleans District

Trinityfarm Construction Company (Contractor)

Contract for Kempe-Lake St. John Levee, Item R 674-A, Item R 674-B. Amount: $59,240.00, $74,050.00—$133,290.00 (Approximately).
Place: Lower Tensas Levee District.
Date of Receipt: 8/18/32.

Aug. 19 to 31, Inc.	13 days
Sept., Oct., Nov., Dec. & Jan.	153 days
Feb. 14, Inc.	14 days
Time Up Feb. 15, 1933	180 days

Contract for Construction

This contract entered into this fifth day of August, 1932, by the United States of America, hereinafter called the Government, represented by the contracting officer execut-

ing this contract, and Trinityfarm Construction Co., a corporation organized and existing under the laws of the State of Delaware, of the City of Dallas, in the State of Texas, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of Work.—The contractor shall furnish all labor and materials and perform all work required for the construction of Kempe-Lake St. John Levee, Item R 674-A, containing approximately four hundred thousand (400,000) cubic yards and Item R 674-B containing approximately five hundred thousand (500,000) cubic yards, both situated in the Lower Tensas Levee District.

[fol. 35] For the consideration of fourteen and eighty-one one-hundreds (14-81) cents per cubic yard; place measurement, in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof and designated as follows: Engineer Department, U. S. Army, Standard Specifications for Levee Work, No. 32253, dated June 16, 1932, and drawing entitled Items R 674 A and B. and R 674 E, F, & G, "Kempe-Lake St. John Levee", file No. L-8-2284, A, B, C, D and E.

The work shall be commenced as provided for in paragraph 2 of the specifications attached hereto and made a part hereof, and shall be completed within the time fixed for completion in paragraph 34 of said specifications.

Article 2. Specifications and Drawings.—The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 3. Changes.—The contracting officer may at any time by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall [fol. 36] be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. Changed Conditions.—Should the contrator encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The Contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications)

shall be subject to inspection, examination and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with porper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

[fol. 37] (c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the

specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7. Materials and Workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of quality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval [fol. 38] full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

Article 8. Superintendence by Contractor.—The contractor shall give his personal superintendence to the work or have a competent foremen or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part

thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, act of the Government, fires, floods, epidemics, quarantine, restrictions, strikes, freight embargoes and unusually severe [fol. 39] weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

Article 10. Permits and Care of Work.—The contractor shall, without additional expense to the Government, obtain

all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. Eight-hour Law—Convict Labor.—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work, contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137) relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 12. Covenant Against Contingent Fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contrtct or in its discretion to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made [fol. 40] through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. Other Contracts.—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer.

The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials not to Benefit.—No Member or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contract shall diligently proceed with the work as directed.

Article 16. Payments to Contractors.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptances of all work covered by the contract: Provided however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, that on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

[fol. 41] (c) All material and work covered by partial payments be made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsi-

bility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fullfillment of all of the terms of the contract.

(d) Upon completion and acceptances of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Additional Security.—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 18. Definitions.—(a) the term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

Article 19. Alterations.—The following changes were made in this contract before it was signed by the parties hereto: ——.

In Witness Whereof the parties hereto have executed this contract as of the day and year first above written.
[fol. 42] (Sgd.) The United States of America, by J. N. Hodges, Lieut. Col., Corps of Engineers, U. S. Army. (Signed) Trinityfarm Construction Co. (Contractor), by J. D. Kirvem, Vice-President, 1507 Santa Fe Bldg., Dallas, Texas.

Two witnesses:

(Signed) C. C. Middleton, (Signed) C. L. Miller.

I, D. K. Woodward, Jr., certify that I am the Assistant Secretary of the corporation named as contractor herein; that J. D. Kirven, who signed this contract on behalf of the contractor, was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(Signed) D. K. Woodward, Jr., Assistant Secretary.
(Seal.)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, —— ——, who signed this contract for the —— had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

—— ——, Contracting Officer.

This contract is authorized by the acts of May 15, 1928, and February 23, 1931.

Directions for Preparation of Contract

1. This form shall be used for every formal contract for the construction or repair of public buildings or works, but its use will not be required in foreign countries.

2. There shall be no deviation from this standard contract form, except as provided for in these directions, without prior approval of the Director of the Bureau of the Budget obtained through the Interdepartmental Board of Contracts and Adjustments. Where interlineations, deletions, additions or other alterations are permitted, specific notation of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to [fol. 43] deviate from the standard form. Deletion of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations".

3. The blank space of Article 1 is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

4. If it is deemed necessary to include an article on Patents the Invitation to Bidders shall so state and the following article be used:

Article. Patents.—The contractor shall hold and save the Government, its officers, agents, servants and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specifications, the use of which the contractor does not control.

5. Where only one payment is contemplated, upon completion of the contract, all except paragraph (d) of Article 16, "Payments to Contractor", must be stricken out.

6. If approval of the contract is required before it shall become binding the following article must be added:

Article. Approval.—This contract shall be subject to the written approval of —— and shall not be binding until so approved.

Contracts subject to approval are not valid until approved by the authority designated to approve them, and the contractor's copy will not be delivered nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

7. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, amount of bond, designation of place of inspection, as well as other administrative details, shall be as directed by the department to which the contract pertains.

8. All blank spaces must be filled in or ruled out. The contract must be dated, and the bond must bear the same or subsequent date.

[fols. 44-55] 9. An officer of a corporation, a member of a partnership or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

10. If the contractor is a corporation, one of the certificates following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate

seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

11. The full name and business address of the contractor must be inserted, and the contract signed with his usual signature. Typewrite or print name under all signatures to contract and bond.

12. The contracting officers must fill in the citation of the act authorizing the contract as indicated at the end of the last page of the contract.

13. The Invitation, Bid, Acceptance and Instructions to Bidders are not to be incorporated in the contract.

14. The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract.

[fol. 56] EXHIBIT ON BEHALF OF DEFENDANT, BEING AFFIDAVIT OF J. D. KIRVEN—Filed Nov. 28, 1932

U. S. DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

#271

TRINITYFARM CONSTRUCTION CO.

v.

ALICE LEE GROSJEAN, Supervisor, et als.

STATE OF TEXAS,
County of Maverick, ss:

Before me, the undersigned authority, on this day personally appeared J. D. Kirven, to me well known and known to me to be a credible citizen of Ellis County, Texas, who being by me first duly sworn, on his oath deposes and says as follows:

1. That he is Vice-President, Director and General Manager of Trinityfarm Construction Company, a private cor-

poration, complainant in Cause No. 271 on the Docket of the District Court of the United States for the Eastern District of Louisiana styled Trinityfarm Construction Company vs. Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, et al.

2. That this affidavit is made and executed for the purpose of being offered in evidence upon hearing of the above styled and numbered cause.

3. That affiant is General Manager of said Corporation and has been since its organization and knows of his own knowledge, through personal participation therein, the manner in which bids of said corporation for work to be performed for the United States Government have been and will be prepared and computed.

4. That Trinityfarm Construction Company uses in its operations a large amount of power-driven machinery and that gasoline is essential to the operation of all such machinery.

5. That in determining the amount of its bid on any piece of work upon which the United States Government has called for bids the officers and directors of Trinityfarm Construction Company compute the actual cost of comp-eting [fol. 57] such work, divide the sum total of such cost by the number of cubic yards required to be moved under the proposed contract and add to the quotient resulting the profit per cubic yard which is deemed fair and reasonable under the circumstances of the particular case. The sum so obtained constitutes the bid price of said Corporation.

6. That gasoline is used in large amount in the performance of such contracts and its cost delivered on the job is a material item of expense included in determining the cost of performing any job upon which a bid is submitted.

7. That in submitting its bids to the United States Government on the Kempe-Lake St. John Levee and on the Cottage Kempe Levee the officers and directors of said corporation included in the cost thereof the cost of gasoline necessary to perform the work required.

8. That the cost of such gasoline was calculated in compiling such bids on the basis of purchase at wholesale in carload lots without addition of any sum whatever to cover

excise taxes claimed by the State of Louisiana for the privilege of using such gasoline in the performance of such work.

9. That the bids submitted by said corporation to the United States Government for construction of each of said levees would have been proportionately higher than the bid actually submitted if such excise taxes had been included in the cost of said gasoline.

10. That in future bids which such corporation contemplates submitting to the United States Government the cost of gasoline necessary in proposed construction will be included as heretofore, and if it be held that the State of Louisiana is entitled to collect an excise tax for the use of such gasoline upon such work the bid of said corporation will be proportionately higher than it would be is such tax were not imposed.

Further, affiant saith not.

(Signed) J. D. Kirven.

Subscribed and sworn to before me by J. D. Kirven this 26th day of November, A. D. 1932. (Signed) Signature Illegible, Notary Public in and for Maverick County, Texas. My commission expires June 1st, 1933. (Seal.)

[fol. 58] AFFIDAVIT OF JUSTIN C. DASPIT, MARKED EXHIBIT D-2—Filed Nov. 28, 1932

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Before me, the undersigned authority, personally came and appeared Justin C. Daspit, to me well and personally known, who, being first sworn by me, did depose and say:

That he was, on August 27, 1930, and for some years prior thereto, an Assistant Supervisor of Public Accounts of the State of Louisiana, and is presently counsel for said Department.

That a part of his duties as such official was to enforce the statutes of the State of Louisiana relating to a tax on gasoline and motor fuel.

That it was the policy of the Supervisor of Public Accounts at that time, as well as at the present time to regard contractors with the United States Government for levee construction work as independant contractors, and not as agencies or instrumentalities of the United States Government, this policy being predicated upon the construction placed upon said statutes by the office of Supervisor of Public Accounts since the enactment of the first gasoline tax statute by the Legislature of Louisiana in the year 1921, being Act 81 of the Legislature of said state of that year, and maintained and adhered to by reason of a decision of the Attorney General of Louisiana rendered to affiant in his capacity as Assistant Supervisor of Public Accounts of Louisiana on August 27, 1930, and published in the "Opinions of the Attorney General of Louisiana", for the biennial period commencing May 1, 1930 and ending April 30, 1932, at page 203 thereof, a copy of which aforesaid opinion is hereto annexed and made a part hereof and marked "Exhibit A".

Affiant avers that in pursuance of the aforesaid established policy of the Supervisor of Public Accounts of Louisiana to regard levee contractors, constructing levees under contract with the United States Government, as independent contractors and not as agencies or instrumentalities of the United States, and further in pursuance of the aforesaid ruling of the Attorney General of Louisiana hereinabove referred to, an application of Trinityfarm Construc-
[fol. 59] tion Co. (complainants in Suit No. 271, in equity, —filed in the U. S. District Court for the Eastern District of Louisiana, against Alice Lee Grosjean, Supervisor of Public Accounts of Louisiana, et al.,) for a refund of gasoline taxes paid by it to the State of Louisiana during the period from December 1, 1930 to June 30, 1932, was denied for the reasons given in a letter addressed by affiant to said corporation as per carbon copy hereto annexed and marked "Exhibit B", and as per carbon copy of a letter written by affiant to said corporation on August 20, 1932, hereto annexed as "Exhibit C".

That the aforesaid original application for a refund, filed by the Trinityfarm Construction Co., as aforesaid, and supported by a sworn statement of one C. C. Middleton, purporting to be the Secretary-Treasurer of said Trinity-

farm Construction Co., is hereto annexed and marked "Exhibit D".

Affiant further avers that the aforesaid annexed documents evidence that the aforesaid Trinityfarm Construction Company had paid the taxes on gasoline consumed by it in the State of Louisiana on other levee construction work contracted with the United States Government to be done by it in Louisiana prior to the dates of its respective present contracts with the United States Government, to-wit: July 16, 1931 and August 5, 1932, and that it therefore had both actual and constructive knowledge and notice that the aforesaid taxes should be incorporated in the price of its aforesaid bids for the levee construction work aforesaid as a part of the basic cost of said work.

(Signed) Justin C. Daspit.

Sworn to and subscribed before me, at Baton Rouge, Louisiana, this 26th day of November, 1932. (Signed) J. Elton Huckabay, Notary Public. (Seal.)

[fol. 60] EXHIBIT ON BEHALF OF DEFENDANT, BEING AFFIDAVIT OF WILLIAM A. COOPER—Filed January 19, 1933

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Before me, the undersigned authority, personally came and appeared William A. Cooper, a resident of the City of Baton Rouge, East Baton Rouge Parish, Louisiana, to me well and personally known, who being first sworn by me, did depose and say:

1. That he is now, and has been since the incumbency of Miss Alice Lee Grosjean as Supervisor of Public Accounts, the Assistant Supervisor of Public Accounts of the State of Louisiana, in direct charge of all tax collections.

2. That in his aforesaid official capacity he has had, and now has, active charge, among other duties, of enforcing collection of the so-called Gasoline Tax Laws of the State of Louisiana, levied under authority of the Constitution of said State, affiant particularly referring to Act 6 (E. S.)

1928, as amended, and the Constitutional Article of the State duly adopted, and submitted as Act 1 (E. S.) 1930.

3. That the revenues of the State of Louisiana under the laws aforesaid approximate a minimum monthly average of Seven hundred thousand ($700,000) Dollars.

4. That in pursuance of the laws aforesaid the Supervisor of Public Accounts of Louisiana is required to make, and does make, within the first five days of each calendar month after the receipt of such taxes from the taxpayers, a settlement with the Treasurer of the State of Louisiana of all the aforesaid taxes collected during the preceding calendar month.

5. That in making such settlements the Supervisor of Public Accounts makes proper deduction of any and all amounts which may have been refunded to taxpayers under the provisions of Section 14 of the aforesaid Act 6 (E. S.) of 1928, as amended, and Section 14 of the aforesaid Constitutional Article generally known and referred to as Act 1 (E. S.) of 1930.

6. That the amount of funds in the hands of the Supervisor of Public Accounts of Louisiana, at the end of each month, and before settlement with the State Treasurer, and representing collections of the aforesaid so-called Gasoline Taxes of Louisiana, is at all times sufficient in amount [fol. 61] to meet any legitimate claim for refund of the taxes aforesaid, even up to the amount of total tax collections if necessary.

7. That by reason of the fact that a considerable number of gasoline tax debtors in Louisiana are not operating under bond, but pay the gasoline taxes in cash, there is always on hand with the Supervisor of Public Accounts, even immediately succeeding the monthly reports to the State Treasurer, a sum in cash aggregating a monthly minimum average of Twelve thousand ($12,000) Dollars.

8. That in instances where an unliquidated claim for refund of taxes is pending before monthly settlement by the Supervisor of Public Accounts with the Treasurer of the State, and which has not been satisfactorily proved or established by the claimant taxpayer before the date of settlement by the Supervisor with the Treasurer has arrived,

it is the policy of the Supervisor of Public Accounts to withhold in said settlement with the State Treasurer, an amount sufficient to pay any outstanding claim for refund of taxes which has not yet been satisfactorily established or proved, to the end that prompt payment of such claim may be effected immediately upon establishment of its validity and correctness.

(Signed) W. A. Cooper.

Sworn to and subscribed before me, at the City of Baton Rouge, Louisiana, on this 16th day of the month of January, A. D. 1933. (Sgd.) H. Carey Comish, Notary Public. (Seal.)

[fol. 62] In United States District Court, Eastern District of Louisiana, Baton Rouge Division

No. 271

Trinityfarm Construction Company

vs.

Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, et al.

Decree Granting Preliminary Injunction—Filed Dec. 17/32

This cause came on for hearing on a former day on the application of plaintiff for the issuance of a preliminary injunction and was argued and submitted upon the pleadings and an agreed statement of facts and upon the affidavits filed in the cause by the respective parties, whereupon the Court took time to consider and now being advised.

It is ordered, adjudged and decreed that a preliminary injunction issue as prayed for in said bill conditioned upon the plaintiff furnishing a bond approved by the Court in the sum of Six Thousand Dollars ($6,000.00).

New Orleans, Louisiana, December 7, 1932.

(Signed) Rufus E. Foster, U. S. Circuit Judge.
(Signed) Wayne G. Borah, U. S. District Judge.
(Signed) Allen Cox, U. S. District Judge.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CALLING CASE FOR REARGUMENT—Feb. 4, 1933

This cause having been heretofore heard before the Court, composed of Judges Foster, Cox & Borah, and the Court desiring that a reargument be had in the above cause, and that all parties in interest be duly notified thereof;

It is Ordered that the above cause be reargued, the date of said reargument to be hereafter fixed and that all parties in interest be notified thereof.

[fol. 64] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

No. 271

TRINITYFARM CONSTRUCTION COMPANY

versus

ALICE LEE GROSJEAN, Supervisor of Public Accounts of the State of Louisiana, et al.

Breazeale & Sachse and D. K. Woodward, Jr., Esqs., Counsel for Plaintiff.

Gaston L. Porterie, Attorney General; Peyton R. Sandoz and Justin C. Daspit, Special Assistant Attorneys General, Counsel for Defendants.

Before Foster, Circuit Judge, and Borah and Cox, District Judges

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 12, 1933

BORAH, District Judge:

This suit was brought against defendants, state tax officials, to enjoin the collection of a state excise tax levied upon the use of gasoline by plaintiff within the State. On

motion of the attorneys for the plaintiff, Trintyfarm Construction Company, a District Court of three judges was organized and convened to hear its application for an interlocutory injunction, a preliminary restraining order having been granted without notice because of the danger of irreparable injury resulting by a delay until notice could be given and a hearing had on said application for an interlocutory injunction. After a full hearing, at which evidence was introduced in the form of affidavits, and argument had by counsel, the court issued an interlocutory injunction in accordance with the prayer of the bill. The case is now before the court for trial hearing on the merits.

Findings of Fact

The verified pleadings, agreed statement of facts and undisputed affidavits filed herein show that the plaintiff is a private corporation organized under the laws of Delaware and is presently engaged in the construction of levees within the State of Louisiana under contracts with the United States of America. For this purpose the plaintiff has imported certain gasoline in tank car lots from other states which it places in a central storage tank from which [fol. 65] it is distributed to storage tanks located on its rights of way in proximity to the machine in which it is used. Plaintiff also proposes to import additional gasoline to be handled in like manner. It further appears that none of said gasoline has been, is now or will be used on or over the public highways and bridges of the State of Louisiana, but all of it is being used exclusively on the work which plaintiff has contracted to perform under the contracts and upon rights of way furnished by the State of Louisiana or the Tensas Levee District of the United States for the construction of levees.

The statutes of Louisiana complained of (Act 6 of 1928 as amended by Act 8 of 1930 and Act 16 of 1932 and Act 1 of the Extra Session of 1930, the latter being in fact an amendment to the Constitution of Louisiana) levy a cumulative tax of five cents per gallon upon all gasoline or motor fuel "sold, used or consumed in the State of Louisiana for domestic consumption" and requires that the aforesaid tax shall be collectable from "all persons, firms, corporations or association of persons, engaged as dealers in the handling, sale, or distribution of such products within the State

of Louisiana." The term "dealer" is defined to mean "any person, firm, corporation or association of persons who produces, refines, manufactures, blends or compounds gasoline * * * for sale to the jobber or consumer, or to the persons * * * who, in turn, sell to the jobber or consumer. The term 'dealer' is further defined to mean the person, firm, corporation or association of persons who imports such gasoline * * * from any other State or foreign country for distribution, sale or use in the State of Louisiana." In addition the statutes provide that "on all gasoline * * * imported from other States and used by him, the 'dealer' as thus defined shall pay the tax on the amount so imported and used, the same as if it had been sold for domestic consumption."

The plaintiff contends that it is not a dealer in gasoline and that the gasoline used by it is an instrumentality of interstate commerce and cannot be taxed by the State for so to do would be to lay a burden upon such commerce which is prohibited by the commerce clause of the Federal Constitution. Exemption is also claimed for the further reasons: (1) that the tax is imposed upon an agency or instrumentality of the United States; and (2) that the statutes are violative of the due process and equal protection clauses of the Federal and State Constitutions.

[fol. 66] Conclusions of Law

From the findings of fact the court has reached the legal conclusion that plaintiff is chargeable with the taxes levied under the Constitutional provisions and statute above referred to on gasoline imported into Louisiana for exclusive use by it within the State of Louisiana.

The tax which plaintiff is called upon to pay is an excise and not a property tax, the tax being laid not upon the gasoline but upon the right or privilege of selling, using or consuming it.

A State may tax the "use" to which gasoline is put in withdrawing it from storage within the State and it is at the time of withdrawal alone that "use" is measured for the purpose of the tax as the stored gasoline is deemed to be "used" within the State and therefore subject to the tax when it is withdrawn from the tanks. Edelman et al.

v. Boeing Air Transport, Inc., (decided by U. S. Supreme Court April 17, 1933.)

The plaintiff company is not such a governmental instrumentality, as exempts it and its property from liability for taxes under the revenue laws of the State. If it may be said to be an instrumentality of the government, its relations to the government are nevertheless purely contractual. It does not exercise governmental functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying.

While plaintiff does not state wherein its rights under the due process clauses referred to are impinged, we assume it is because it is required by the statutes in controversy to pay an excise tax as "dealer" based on the number of gallons of gasoline handled, distributed and consumed by it in Louisiana as the privilege of engaging as such "dealer" in the handling, distribution and use of that commodity in the State, and that the methods provided by said statutes for the enforcement and collection of the excises imposed by them are so summary and exacting as not to constitute "due process of law"; however, there is no substance in the objection as the precise point has been considered and disposed of by the United States Supreme Court in two [fol. 67] adjudicated cases. See Bowman v. Continental Oil Co., 256 U. S. 642; Hart Refineries v. Harman, 278 U. S. 499.

The order heretofore entered granting an interlocutory injunction is recalled, and the decree for injunction denied, and the bill of complaint dismissed. Appropriate orders may accordingly be entered.

[fol. 68] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA (BATON ROUGE DIVISION)

In Equity. No. 271

TRINITYFARM CONSTRUCTION COMPANY, Plaintiff,

versus

ALICE LEE GROSJEAN, Supervisor of Public Accounts of Louisiana, et al., Defendants

FINAL DECREE—Filed June 15, 1933

This cause came on for hearing on application of plaintiff for an interlocutory injunction on November 28, 1932, and was submitted to the Court on briefs, and upon the pleadings and an agreed statement of facts, and upon affidavits filed in the cause by the respective parties, and upon such hearing the Court issued an interlocutory injunction in accordance with the prayer of the bill.

Thereafter, to-wit: On January 19, 1933, this cause was submitted to the Court for consideration on the merits, upon the record as made as made up, after argument but without submission of additional briefs; and thereafter, to-wit: On March 16, 1933, on the Court's own motion, a reargument of the cause was had.

Whereupon the Court took time to consider and now being advised and for the reasons assigned in the written opinion on file;

It is ordered, adjudged and decreed that the order heretofore entered granting an interlocutory injunction be and the same hereby is recalled; that the plaintiff's prayer for injunction be and the same is hereby denied and that its bill of complaint herein be and the same is hereby dismissed, with costs.

New Orleans, Louisiana, June 15, 1933.

(Signed) Rufus E. Foster, Circuit Judge. (Signed) Allen Cox, District Judge. (Signed) Wayne G. Borah, District Judge.

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 14, 1933

Trinityfarm Construction Company, Plaintiff in the above entitled cause, feeling itself aggrieved by the final order or decree of the District Court entered on the 15th day of June, 1933, prays an appeal therefrom to the Supreme Court of the United States. The particulars wherein it considers the final order or decree erroneous are set forth in the Assignments of Error filed herewith, to which reference is made.

It prays that a transcript of the record, proceedings and papers upon which the final order or decree was made and entered may be duly authenticated and transmitted forthwith to the Supreme Court of the United States.

(Signed) D. K. Woodward, Jr., (Signed) Breazeale & Sachse, (Signed) H. Payne Breazeale, (Signed) Victor A. Sachse, Attorneys for Plaintiff.

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 14, 1933

Comes now the plaintiff in the above-entitled cause and in connection with its petition for appeal files the following assignment of errors on which it will rely on its appeal to the Supreme Court of the United States from the final order or decree of the District Court entered June 1933.

The District Court erred:

1. In denying plaintiff's prayer for a permanent injunction.

2. In recalling the interlocutory injunction issued herein.

3. In dismissing plaintiff's bill of complaint.

4. In failing to hold that the contracts between plaintiff and the United States for the construction of levees on

the main stem of the Mississippi River are "Federal Instrumentalities."

5. In failing to hold that gasoline used by plaintiff exclusively in the performance of such Federal contracts is a part of plaintiff's equipment, and, as such, exempt from excise taxes sought to be levied by the State of Louisiana.

6. In failing to hold the excise tax complained of unconstitutional and void, as imposing a direct burden upon the performance by the Federal Government of its delegated powers.

[fol. 71] 7. In holding that the State of Louisiana may impose a direct burden upon the contracts between the United States and plaintiff by exacting from plaintiff payment of an excise tax for the privilege of using its equipment in the performance of such contracts.

8. In failing to hold that the statutes complained of, as administered by the State of Louisiana, are unconstitutional and void insofar as the same purport to levy an excise tax upon plaintiff for the privilege of using its gasoline wholly and exclusively in the performance of its contracts with the United States.

9. In failing to hold that the statutes complained of could have no application to gasoline used wholly and exclusively by plaintiff in the performance of its contracts with the United States, and that, if such application were intended, it was beyond the power of the State of Louisiana to levy such excise tax.

10. In holding that the State of Louisiana has power to levy and collect an excise tax from plaintiff for the privilege of using its gasoline solely in the performance of its contracts with the United States.

11. In holding plaintiff liable for payment of an excise tax for the privilege of using its gasoline solely in performance of its contracts with the United States.

12. In holding plaintiff liable for payment of the excise tax complained of when such tax is laid solely upon the use by plaintiff of its gasoline in performing its contracts with the United States.

13. In holding plaintiff to be a "dealer" in gasoline, and as such liable for the payment of an excise tax on gasoline, used exclusively and wholly by plaintiff in the performance of its contracts with the United States.

Wherefore said plaintiff prays, that said decree of June 1933, be reversed and set aside and that the injunction prayed for in this matter be issued and made permanent.

(Signed) D. K. Woodward, Jr., (Signed) Breazeale & Sachse, (Signed) H. Payne Breazeale, (Signed) Victor A. Sachse, Attorneys for Plaintiff.

[fols. 72-78] IN UNITED STATES DISTRICT COURT

In Equity. No. 271

TRINITYFARM CONSTRUCTION COMPANY, Plaintiff,

vs.

ALICE LEE GROSJEAN, Supervisor of Public Accounts of the State of Louisiana, Defendant

ORDER ALLOWING APPEAL—Filed July 14, 1933

In the above-entitled cause, the plaintiff having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court entered June 15, 1933, and having also made and filed Assignments of Error and Statement of Grounds of Jurisdiction, and having in all respects conformed to the statutes and rules of the Court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby allowed as prayed, upon the plaintiff giving bond in the sum of Twenty five Thousand ($25,000.00) Dollars, which bond shall serve for supersedeas and stay of judgment as well as for the costs of such appeal, returnable in forty (40) days from the date hereof, and the Clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which

the order or decree was made and entered to the Supreme Court of the United States.

Made and entered this 14th day of July, 1933.

(Signed) Rufus E. Foster, United States Circuit Judge. (Signed) Wayne G. Borah, United States District Judge. (Signed) Allen Cox, United States District Judge.

[fol. 79] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE TO ATTORNEY GENERAL OF LOUISIANA—Filed July 14, 1933

To Honorable Gaston L. Porterie, Attorney General of the State of Louisiana:

Pursuant to the provisions of Section 266 Judicial Code, Act March 3, 1911, as amended, you are hereby notified that the Trinityfarm Construction Company, plaintiff, has taken an appeal from the final order or decree of the District Court, entered June —, 1933, to the Supreme Court of the United States, and that the order allowing appeal makes the same returnable within forty (40) days from the date thereof.

(Sgd.) D. K. Woodward, Jr., Breazeale & Sachse, H. Payne Breazeale, Victor A. Sachse, Attorneys for Appellant.

Service of the foregoing notice and the receipt of a copy thereof are hereby acknowledged this 14th day of July, 1933.

(Sgd.) G. L. Porterie, Attorney General, State of Louisiana, by G. N. Wallace, First Assistant Attorney General.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL TO GOVERNOR OF THE STATE OF LOUISIANA —Filed July 14, 1933

To Honorable Oscar K. Allen, Governor of the State of Louisiana:

Pursuant to the provisions of Section 266 Judicial Code, Act March 3, 1911, as amended, you are hereby notified

that the Trinityfarm Construction Company, plaintiff, has taken an appeal from the final order or decree of the District Court, entered June 15th, 1933, to the Supreme Court of the United States, and that the order allowing appeal makes the same returnable within forty (40) days from the date thereof.

(Signed) D. K. Woodward, Jr., Breazeale & Sachse, H. Payne Breazeale, Victor A. Sachse, Attorneys for Appellant.

Service of the foregoing notice and the receipt of a copy thereof are hereby acknowledged this 14th day of July, 1933.

(Signed) Oscar K. Allen, Governor of the State of Louisiana.

[fol. 81] Citation, in usual form, showing service on Peyton R. Sandoz, filed July 14, 1933, omitted in printing.

[fols. 82 & 82a] Bond on appeal for $25,000, approved and filed July 26, 1933, omitted in printing.

[fol. 83] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 14, 1933

The Clerk of the United States District Court for the Eastern District of Louisiana will please proceed to make up the transcript in the above numbered and entitled cause, including therein the following:

1. Plaintiff's original petition, affidavit and attached order of Court.
2. Defendant's original answer.
3. Original Agreed statement of facts and admissions submitted to the trial court by plaintiff and defendant, with attached contracts marked exhibits D-3 and D-4.
4. Affidavits of J. D. Kirven, Justin C. Daspit, without attached exhibits, and W. A. Cooper.
5. Decree of Court granting preliminary injunction.

6. Order of Court calling for reargument on final hearing.

7. Written reasons of court for judgment with particular reference to findings of facts and conclusions of law.

8. Decree of the Court.

9. Petition for appeal, assignment of errors and prayer for reversal and statement of grounds of jurisdiction of the United States Supreme Court, filed by plaintiff-appellant.

10. Order allowing appeal and fixing bond.

11. Notice of appeal, notice required by Rule 12 of the Supreme Court of the United States and written acknowledgment of service thereof on the Governor and Attorney General of Louisiana.

12. Citation of appeal addressed to defendant, appellee, Alice Lee Grosjean, Supervisor of Public Accounts of Louisiana, with attached acknowledgment of service and receipt of copy thereof, by attorney for defendant-appellee.

13. Bond of appeal with approval thereof.

14. This præcipe, with attached acknowledgment of service thereof on counsel for defendant-appellee, and attestation by said counsel that they have no request for additions thereto.

15. Your certificates.

(Signed) D. K. Woodward, Jr., (Signed) Breazeale & Sachse, (Signed) H. Payne Breazeale, (Signed) Victor A. Sachse, Counsel for Appellants.

[fol. 84] We hereby acknowledge service of the foregoing præcipe, and attest that he have no request for additions thereto.

Dated at New Orleans, Louisiana, on this 14th day of the month of July, A. D. 1933.

(Signed) Gaston L. Porterie, (Initialed) S., Attorney General of Louisiana; (Signed) Peyton R. Sandoz, Special Asst. Atty. General; (Signed) Justin E. Daspit, Special Asst. Atty, General, (Initialed) S., for Defendant-Appellee.

[fols. 85 & 86] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 87] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Aug. 17, 1933

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this cause are as follows:

Point 1. The contracts existing between the United States and appellant for the construction of levees on the main stem of the Mississippi River are means adopted by the Federal Government for carrying out its delegated powers, and the District Court erred in failing so to hold.

Point 2. The statutes complained of impose a direct burden upon the contracts existing between the United States and appellant and are, therefore, unconstitutional and void as applied to such contracts and the District Court erred in failing so to hold.

Point 3. The statutes complained of impose an excise tax upon appellant for the privilege of using gasoline owned by appellant wholly and exclusively in performance of appellant's contracts with the United States. Such tax is a direct burden upon the United States in the discharge of its delegated powers, which burden the State of Louisiana is without power to impose, and the District Court erred in failing so to hold.

Point 4. The State of Louisiana is without power to tax appellant for the privilege of using its property in performing its contracts with the United States, and the District Court erred in failing so to hold.

Point 5. Appellant is in no sense a dealer in gasoline, since it buys to use and does not buy to sell again, and since the tax is imposed only upon dealers it can not be legally imposed upon appellant; further, if appellant be considered a "dealer" under the provisions of such statutes, in as much as no indication of such definition is found in the title or caption of the statutes, to that extent they are in violation of the Constitution of the State of Louisiana, and the United States District Court erred in failing so to hold.

[fol. 88] And appellant further states that the entire record should be printed, save and except Exhibit D-4, be-

ing Standard Government Form on Contract, typewritten record pages 45 to 55, both inclusive, which, in so far as this case is concerned, is identical to Exhibit D-3, commencing on page 34.

D. K. Woodward, Jr., H. Payne Breazeale, Victor A. Sachse, Attorneys for Appellant.

Baton Rouge, La., August 14, 1933.

We hereby acknowledge service of the foregoing "Statement of points to be relied upon and designation of parts of record to be printed," and attest that we have no request for additional parts of the record to be printed.

G. L. Porterie, Attorney General, S.; Peyton R. Sandoz, Special Assistant Attorney General; Justin E. Daspit, S., Special Assistant Attorney General, Attorneys for Appellee.

[fol. 89] [File endorsement omitted.]

Endorsed on cover: File No. 37,958. E. Louisiana D. C. U. S. Term No. 355. Trinityfarm Construction Company, appellant, vs. Alice Lee Grosjean, Supervisor of Public Accounts for the State of Louisiana. Filed August 17, 1933. No. 355, O. T., 1933.